first defendants' predecessors in title, Tan Siew Wah, who affirmed an affidavit to the effect, that she had told an unspecified member of the second defendants that she and her family would not want to recover possession of the upper floor and that the second defendants could 'rent the upper floor as long as they wanted for'. Tan also affirmed that during her nine years from 1957 to 1966 as owner of the premises, the second defendants had attended to the maintenance and upkeep of the upper floor of the premises on their own account.

The second defendants relied on this to say that they were licensees coupled with an equity. Their equity arose because:

(a) they had been occupying the upper floor of the premises for 47 years;
(b) Tan Siew Wah had assured them that they could stay there forever; and
(c) the second defendants spent money on repairs, maintenance and the like.

However, the second defendants' claim that they have an equity in the upper floor and therefore a defence to the plaintiffs' claim for possession was wholly untenable. In the first place, the second defendants could not claim an equity in the upper floor of the premises for the same reason they could not hold a tenancy, namely, that they had no legal personality as they were only a composite entity of fluctuating content and not a persona legalis: see *Ang Bock Chwee*'s case[3] and *Vengadasalam*'s case.[4]

Second, they had interpreted Tan Siew Wah's assurance as one that they could stay on the premises forever. In fact, Tan Siew Wah explained in her affidavit the context of her assurance. She had bought the premises in 1957 intending to use the lower floor for her own use as a shop. At the time of the purchase, both floors were tenanted. She tried to persuade the Hainanese tenant and his family to give up possession of the lower floor to her and did not come to any agreement with them because they asked for too high a sum for compensation.

As for the upper floor, she had no intention of using it. She was content to rent it to the second defendants. It was in this context that she said she did not want to recover possession of the upper floor and that the second defendants could 'rent the upper floor as long as they wanted to'.

Eventually, she sold the whole premises to the Hainanese family as a result of their refusal to move out. I am unable to see how the words of Tan Siew Wah uttered against this context could ever be relied upon by the second defendants as a promise that they could eventually obtain an equity in the upper floor of the premises.

Third, even if the second defendants could in law hold an interest in land and did acquire, on the facts, an equity in the upper floor, I am unable to see how that equity binds any of Tan Siew Wah's successors in title or the plaintiffs in the absence of any evidence that they knew of Tan Siew Wah's assurances to the second defendants. No caveat had been lodged against the premises. The plaintiffs were clearly entitled to treat the premises as unencumbered. And once it was conceded that the second defendants could not in law hold a tenancy, they had from the outset absolutely no defence to the plaintiffs' claim. I therefore dismissed the second defendants' application.

On the question of costs, I was of the view that in view of the plaintiffs' remiss in not having served notice of the hearing on the second defendants, thereby depriving them of any right of hearing they might otherwise have had, and thereby necessitating this application, I would make no order as to costs.

Application dismissed.

Solicitors: *RCH Lim & Co; Lee Bon Leong & Co.*

Reported by *Kevin Mathews*

Indian Overseas Bank v Lim Hug Hiong

HIGH COURT (SINGAPORE) — SUIT NO 348 OF 1982
YONG PUNG HOW CJ
18 DECEMBER 1990

Banking — Guarantee — Term loan — Whether defendant a guarantor — Defendant failed to sign guarantee — Loans disbursed — Defendant signing guarantee after loans disbursed — No further advances made

The plaintiffs' claim against the defendant was based on a guarantee executed by the defendant to secure payment on demand of all advances made to the company. In 1976 the company was granted credit facilities by the plaintiffs and executed a debenture in their favour to secure the facilities. Personal guarantees were also signed by two of its directors. A few months later the company required further facilities and on the recommendation of their business adviser the plaintiffs offered the company further facilities to be secured by creating an additional debenture and by personal guarantees of all its directors. At that relevant time the defendant had become a director of the company. The other two directors signed a guarantee in the plaintiffs' standard form and the company created the additional debenture in the plaintiffs' favour. However, no guarantee was signed by the defendant despite being requested by the plaintiffs.

Notwithstanding the fact that the facilities were to be made available only after all the formalities in connection with the debenture were completed and that the defendant had not signed any guarantee, the plaintiffs nevertheless proceeded to extend credit facilities covered by the debenture. The term loan was disbursed and another reminder to the company was sent informing them that the defendant had yet to sign the

guarantee. Eventually the defendant signed a standard form guarantee on 6 October 1978. In February 1979 the plaintiffs exercised their rights under the debenture and put the company under receivership and in 1980 demanded from the defendant payment of the sum pursuant to the guarantee. Evidence from the defendant showed that he signed the guarantee in blank on the understanding that the guarantee was for future support by the plaintiffs and was not a guarantee for the past debts of the company.

Held, dismissing the plaintiffs' claim:

(1) The defendant was not involved as a guarantor for a term loan which was applied for by the company on 14 October 1976. The only persons involved were the two directors at that time. Information that the defendant would be joining the board as an additional executive director merely points to the additional management experience which would be available. It was in fact a minor consideration for banking purposes compared with the more weighty information that the capital would be increased and profit estimates and cash flows were enclosed. There was no suggestion that the defendant's guarantee would be part of the support for the term loan.

(2) The plaintiffs were quite happy to disburse the loan without the guarantee of the defendant and with only the guarantee of the other two directors. The guarantee was never a condition or term of the loan and although the guarantee was not signed there was no suggestion that a loan would be stopped or recalled if it was not forthcoming. After the guarantee was signed on 6 October 1978 no advances were granted to the company. The present circumstances showed there was no consideration for the guarantee, and the letter of guarantee having been extracted from the defendant under such circumstances, should not have been used at all.

[*Editorial Note*: The plaintiffs have appealed to the Court of Appeal vide Civil Appeal No 79 of 1990.]

Legislation referred to
Evidence Act (Cap 97, 1990 Ed) s 94

Jimmy Yap for the plaintiffs.
Cheah Kok Lim for the defendant.

Cur Adv Vult

Yong Pung How CJ: This was a claim by the plaintiffs, who are bankers, against the defendant who was alleged to have entered into a contract in writing dated 6 October 1978 to guarantee the payment on demand of all advances not exceeding $250,000 made by the plaintiffs to a company Wah Seng Plastic Industries Pte Ltd ('the company') in pursuance of which contract the plaintiffs made advances to the company, and as a result of which the plaintiffs claimed against him the sum of $122,957.42 and interest.

It will be convenient to deal first with the evidence for the plaintiffs. KS Krishnamoorthy, the present senior manager of the plaintiffs, who was not himself involved in the transaction at the material time, was their only witness. According to this evidence, the company was a manufacturer of plastic products and was incorporated on 10 November 1975 with a paid-up capital of $79,003. The company started an account with the plaintiffs on 15 March 1976. At that time, the directors of the company were Chong Chong Wah ('Chong') and Quek Chiong Kian ('Quek'). On 12 May 1976, the company was granted its first credit facilities by the plaintiffs and executed a debenture in their favour to secure these credit facilities totalling $80,000. These credit facilities were also secured by the personal guarantee of the two directors who signed a joint and several letter of guarantee dated 31 May 1976 for $150,000.

A few months later, the company required further facilities. The company wrote a letter dated 14 October 1976 to one Julius Ang, who was the plaintiffs' business adviser at the time, applying for a machine loan of $120,000 to be repaid by 24 monthly repayments, after a grace period of 6 months. In para 2 of that letter, the company informed the plaintiffs as follows:

> The company's paid-up capital will be increased to $120,000 and the company organization will be strengthened with an additional executive director Mr Basil HH Lim who has many years of various industrial management experience.

Basil HH Lim or Basil Lim were the other names by which the defendant was known. On 20 October 1976, the defendant at the request of the plaintiffs provided them with a declaration in writing of his personal assets and liabilities. A few days later, on 28 October 1987, the defendant became a director of the company. On 29 October 1976, as the Singapore manager did not have enough authority, the plaintiffs submitted a recommendation to their central office in Madras for credit facilities including a term loan of $120,000 to be granted. Included in a comprehensive submission was a write-up on the company and its prospects. Two of the paragraphs out of eight mentioned the defendant's involvement in the following terms:

> The present paid-up capital of the company is $79,003 and plans are underway to increase the paid-up capital to $120,000 by inclusion of one more director Mr Basil Lim and they intend diversifying the production line. They have planned for production of cassette exterior and concluded deals with M/s Inter Magnetics Corporation, California, USA, for the regular supply of cassettes to them under letter of credit basis.
>
> Mr Basil Lim, the new director, is well versed in this line and had been serving as a director in an Indonesian company in Jakarta (Indonesia) (M/s PT Rising) who were engaged in similar line. He is credited with good experience in the line of the trade.

The consideration of this loan application took an inordinately long time, because it was not until November 1977 in the following year that it was approved. By a letter dated 26 November 1977, the plaintiffs offered the company the following credit facilities: (a) foreign letter of credit limited to $75,000 (including $40,000 for shipping guarantee/trust receipt); (b) clean cash credit: $10,000; and (c) term loan of $120,000 to be repaid in 24 monthly instalments at the end of every month after availment of the loan. These facilities were

to be granted to the company on the terms that they be secured by the company creating an additional debenture in the plaintiffs' favour for $95,000 (together with the first debenture of 12 May 1976 for $80,000 totalling $175,000) and by the personal guarantee limited to $250,000 of all its directors. It was expressly stated in the letter that:

> The facilities will be made available only after all the formalities in connection with the debenture are completed.

On 1 December 1977, Chong and Quek, the other two directors, duly signed a guarantee for $250,000 in the plaintiffs' standard form, and on 14 December 1977, the company created the additional debenture in the plaintiffs' favour. However, no guarantee was signed by the defendant. By a letter dated 21 February 1978, the plaintiffs pointed out to the company that only two out of its three directors had signed the guarantee, and asked for the guarantee to be signed by the defendant and returned to the plaintiffs.

Notwithstanding the fact that the facilities were to be made available *'only after all the formalities in connection with the debenture are completed'*, and that the defendant had not signed any guarantee to the plaintiffs, the plaintiffs nevertheless proceeded to extend the credit facilities covered by the debenture. The term loan of $120,000 was disbursed on 1 March 1978, and the first of the 24 monthly instalment payments of $4,685 thereby became payable on 31 March 1978, being the last day of that month. In a letter on 3 April 1978, the plaintiffs took the opportunity to remind the company that the defendant had yet to sign the guarantee. Thereafter, nothing more was done.

The defendant eventually signed a standard form guarantee for $250,000 on 6 October 1978. By that time, the company was already in arrears with its instalment payments to the extent of $18,740, and it continued to default on subsequent instalment payments. On 9 February 1979, the plaintiffs exercised their rights under the debenture and put the company under receivership. A year later by a letter dated 21 February 1980, the plaintiffs through their solicitors demanded from the defendant payment of a sum of $122,957.42 pursuant to the guarantee which he had signed on 6 October 1978, this being the sum then due by the company to the plaintiffs. No payment having been received by the plaintiffs from the defendant, a writ was finally issued by the plaintiffs against the defendant on 23 January 1982. This claimed the sum of $122,957.42, as the amount of the advances made to the company in pursuance of the guarantee by the defendant together with interest on this sum at the rate of 12% pa from 11 February 1982 until payment. This was the picture presented by the plaintiffs.

It can be seen from the notes of evidence, however, that the plaintiffs had some considerable difficulty with their evidence. The events on which their claim was based happened more than ten years ago; Julius Ang had left the plaintiffs in 1984, having been sent to prison for criminal breach of trust; none of the plaintiffs' other officers who handled the company's account at the material time were still available in the plaintiffs' Singapore office to give evidence; their present senior officers, who had the unenviable task of giving evidence, appeared to know very little more than what was shown in their office records; and these records themselves were clearly not complete. The documentary evidence which was available, and should have discharged the burden of proof for them, merely revealed a picture which had significant gaps and left some critical questions to be answered. In particular, it was impossible to understand without some sort of explanation why the plaintiffs, having pointed out in their letter to the company of 21 February 1978 that only two out of three directors had executed the guarantee and that the defendant had not done so, nevertheless released the term loan on 1 March 1978 without the guarantee by the defendant, if he was indeed a guarantor; or why, apart from the feeble and almost indirect reference in their letter to the company of 3 April 1978 to the fact that the defendant had not yet signed a guarantee, the plaintiffs took no further action to pursue this matter between 3 April and 6 October 1978 when the defendant eventually signed a guarantee; or, even more importantly, why the defendant, who had all along avoided signing any guarantee for the term loan should finally sign what amounted to a general guarantee for $250,000 some ten months later, on 6 October 1978, when the company had already been in financial difficulties for some considerable time, and the company's bank facilities had been effectively stopped by the plaintiffs. The plaintiffs' present senior manager who was their only witness was unable to help. In the circumstances, it was left to the defendant to fill in the gaps and provide the answers to the unanswered questions.

The defendant, who is an engineer by training, gave evidence. He explained that he first became involved with the company in 1976. He was interested in taking over the company, and at the invitation of Chong became a director on 28 October 1976. Chong was then the major shareholder with some 66,000 shares out of about 80,000 shares. Through his own company Goldfinch International Pte Ltd and his wife Foo Chee Kiat, he subscribed $40,000 towards the capital to increase the company's paid-up capital to $120,000. His main responsibility was to introduce his contacts and to bring in business. In 1977 he knew about the negotiations for the term loan as he was already a director. The negotiations were handled by Chong. He had earlier, before he became a director, given particulars of himself and his assets to the plaintiffs at their request. But he had told Chong that, unless he could acquire a majority control

of the company instead of being a minority shareholder, he would not sign any guarantee for the company. At that time, he had proposed to Chong that he would like to acquire a majority control of the company and hold more than 50 per cent of the capital. For this purpose, he had proposed to buy 10,000 of Chong's shares from him, and contribute the additional new capital to give him a majority holding. Chong had agreed to this, and to hold an extraordinary general meeting of the company to implement this. Therefore on 29 March 1978, he saw Julius Ang, the plaintiffs' business adviser at the time, with whom the company was dealing in connection with its banking facilities with the plaintiffs, to inform the plaintiffs of the position and his personal relationship with the company. He wanted to make it clear that he would not sign a guarantee unless he got control. He followed his visit with a letter on the same day. This letter of 29 March 1978 set out his position as follows:

> Indian Overseas Bank
> 1 & 3 Collyer Quay
> Singapore 1
>
> Attn: Mr J Ang
>
> Dear Sir
>
> Re: Wah Seng Plastic Industries Pte Ltd
>
> I thank you very much for your understanding on the discussion this morning in your office concerning the above subject.
>
> In order to commit further personal liability for Wah Seng Plastic Industries Pte Ltd, I feel strongly the company must be reorganized and increase its present paid-up capital to ensure the company to have sound and viable operation.
>
> I did propose to the board of directors meeting held on 23 March in the company's office as follows:
>
> (1) Increase the paid-up capital to $140,000 or $150,000 by issuing new shares at par $20,000 to $30,000 to new investors.
> (2) Transfer the excess $10,000 shares (previously issued in the name of Chong Chong Wah) to Basil Lim or his nominee.
> (3) Increase the number of directors to four or five to include the new investors.
> (4) Chong Chong Wah remains as managing director and directly responsible to the executive directors board which consists of himself, Basil Lim and one (minimum) new director.
>
> The board meeting resolved that an extra ordinary general meeting (EGM) should be called for to resolve the above proposal.
>
> Appreciating your kind attention and full understanding on my personal situation with the company, I am,
>
> Yours faithfully
>
> (Sgd)
> Basil Lim Hug Hiong
>
> cc Chong Chong Wah (Wah Seng Plastic)
> CY Cheong (The company secretary)

But Chong then reneged on the agreement, and nothing more could be done until after September 1978 when Chong retired from the company. There is no other evidence as to the circumstances under which Chong left the company. But, according to the defendant, after Chong left, the defendant went to see Julius Ang on 6 October 1978. By then the company's position had deteriorated, and the company desperately needed money to survive. Unless bank support was forthcoming, the company could not continue. The defendant's plan was to subscribe another $40,000 as capital, and get the plaintiffs to match this with another $40,000 in credit facilities. Julius Ang brought him to see the plaintiffs' manager. The manager agreed to support the company with financing, if the defendant was the majority shareholder and was himself willing to put up more money to increase the company's capital. The defendant was asked to sign a guarantee, and then signed the guarantee form in blank in Julius Ang's office. This was on the understanding however that the guarantee was for future support by the plaintiffs, and was not a guarantee for the past debts of the company.

Since there was now the necessary indication that the plaintiffs would provide support, the defendant set about reorganizing the company. It was by then reduced to doing contract work, day by day. Quek replaced Chong, on the understanding with the defendant that he would run the business until the defendant put up the additional capital, when he would take over the management and become the managing director. The defendant had not put up the additional capital yet, because he did not know the true financial position of the company, and whether there might be hidden creditors. He wanted a proper audit to be done first. On 27 November 1978, he reviewed the position with Julius Ang and on 28 November 1978 sent him a confirmatory letter which said:

> Indian Overseas Bank
> Post Box No 792
> 1 & 3 Collyer Quay
> Singapore 1
>
> Attn: Mr Julius Ang
>
> Dear Sir
>
> With reference to our discussion in your office on 27th instant I am writing hereby to confirm our understanding:
> (1) There are some interested parties intended to buy over and/or to invest as new investor with enough cash to be injected for operation. All these parties are subjected to the acceptance of audited balance sheet 1977 and unaudited financial statement November 1978.
> (2) The board of directors are taking immediate action to appoint a reputable accounting firm to write up up-to-date financial statement and will pass the audited balance sheet 1977 soonest.
> (3) All the present suits from creditors have been handled by the company's solicitor making arrangement for defer action.

Due to above reasons we need two to three weeks to finalize the best way of reorganizing the company before we can submit to you our firm's proposal.

Appreciating your kind attention, we are

Yours faithfully,
Wah Seng Plastic Industries Pte Ltd

(Sgd)
Basil Lim Hug Hiong
Director

cc Board of directors

There were some difficulties in getting the audit started, because much of the needed information was with Chong, who was not completely helpful. In fact, the 1977 audit was not finally completed until much later in 1979. But all this became academic, because on 9 February 1979 the plaintiffs exercised their rights under the debenture and put the company into receivership. This was barely six weeks after his meeting with Julius Ang. The defendant said he was shocked by the plaintiffs' action.

In my opinion, the defendant was not involved as a guarantor for the term loan which was applied for by the company on 14 October 1976. The only persons who were involved were the two directors at the time, Chong and Quek. The information that the defendant would be joining the board as an additional executive director was included in the application merely to point to the additional management experience which would be available. It was in fact a minor consideration for banking purposes, compared with the more weighty information in the same letter that the capital would be increased to $120,000, and compared to the even more important information for a small corporate borrower which was shown by the profit estimates and cash flows which were enclosed. The original recommendation of 29 October 1976 to the plaintiffs' central office in Madras was along the same lines, and there was no suggestion in it that the defendant's guarantee would be part of the support for the term loan. When the loan was finally approved, the plaintiffs were quite happy to disburse it without the guarantee of the defendant, and with only the guarantee of the other two directors of the company. In the present case, a guarantee by the defendant was never a condition or term of the loan. The defendant's position was set out in his letter to the plaintiffs of 29 March 1978, after the loan had been disbursed by the plaintiffs' Singapore office on 1 March 1978. The so-called reminder in the planitiffs' letter to the company of 3 April 1978 appears to have overlooked the defendant's letter of 29 March 1978, and in any event contained no suggestion that the loan would be stopped or recalled if the defendant's guarantee was not forthcoming. The undertaking by the company on 10 April 1978 to liquidate the loan by 24 monthly instalments commencing from March 1978 was signed only by Chong and Quek. Between 1 March 1978 when the loan was first disbursed, and 6 October 1978 when a guarantee was signed by the defendant there was no record of any communication from the plaintiffs to the defendant. In my opinion, the sort of situation which evolved was at most what so often happens in practice: a bank is satisfied to proceed with disbursement of a loan or other facilities to a corporate borrower with the support of only the core directors as guarantors, leaving it to a later opportunity to try to get the guarantees of any of the remaining directors, if possible.

In fact, throughout this period immediately before and after the release of the term loan, the company was performing badly. Even the first three monthly instalment repayments on the term loan could not be paid, and the amounts due were merely transferred to the company's cash credit account, which increased the company's indebtedness under that account towards its limit. On 26 July 1978, the company finally had to give instructions to the plaintiffs to stop payment on a cheque for $1,565.27 because the company's overdraft limit had been reached, and from 28 July 1978, no further overdraft facilities were available to the company. Although the defendant still wanted the company, nothing could be done until Chong left in September 1978. He then set about reorganizing it. Success depended on bank support. After getting the necessary assurances on his visit on 6 October 1978, he signed the disputed guarantee. In fact, he signed the guarantee in blank, and left it with the plaintiffs. The defendant said that it was meant to relate to future facilities and, having watched him closely during two days in the witness box, I was convinced that he was telling the truth on this vital point. After the guarantee was signed on 6 October 1978, no advances were granted to the company, contrary to the allegations in the plaintiffs' statement of claim.

The plaintiffs' counsel pointed out, quite rightly, that notwithstanding s 94 of the Evidence Act (Cap 97, 1990 Ed), a guarantee must be construed not only by the words used but also with regard to the surrounding circumstances. In the present case, the surrounding circumstances showed that there was no consideration for the guarantee which the defendant signed on 6 October 1978, and in fact they showed that the letter of guarantee, having been extracted from the defendant in such circumstances, should not have been used at all.

Accordingly, I gave judgment for the defendant, with costs.

Claim dismissed.

Solicitors: *Donaldson & Burkinshaw; Low Yeap & Co.*

Reported by *Yap Shao Sin*